Supreme Court, U.S.
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NO. 92-276

In the Supreme Court of the United States

OCTBER TERM, 1992

MARIE M. KRIETER, TRUSTEE
Petitioner,

v.

LAWTON CHILES, Governor of the State of Florida; JIM SMITH, Secretary of State; BOB BUTTERWORTH, Attorney General; GERALD LEWIS, Comptroller; TOM GALLAGHER, Treasurer; BOB CRAWFORD, Commissioner of Agriculture; and BETTY CASTOR, Commissioner of Education, constituting the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE THIRD DISTRICT COURT OF APPEAL OF FLORIDA

REPLY TO BRIEF IN OPPOSITION

ROBERT A. ROUTA
P. O. Drawer 6506
Tallahassee, Florida 32314
904/926-6300

Counsel for Petitioner,
Marie M. Krieter
Trustee

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

QUESTION PRESENTED FOR REVIEW

If the State of Florida dedicates submerged lands offshore the Krieter family's riparian holdings for a state park, can the state thereafter deny the Krieters the right to construct a wharf extending into the Atlantic Ocean, where no environmental harm will result from such construction, without the payment of just compensation for the taking of riparian rights?

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REASONS THE WRIT SHOULD BE GRANTED

THE OPINION OF THE THIRD DISTRICT COURT OF APPEAL OF FLORIDA IS IN DIRECT CONFLICT WITH THE DECISIONS OF OTHER STATE COURTS OF LAST RESORT CONCERNING THIS PARTICULAR QUESTION.

It is unfortunate that Marie Krieter must argue first year appellate law to this Honorable Court. However, the Trustees' allegations in their Statement of the Case require reply. For the purpose of passing upon a motion to dismiss a complaint, the court must assume all facts alleged in the complaint to be true. *Connolly v. Sebeco, Inc.* 89 So.2d 482 (Fla. 1956). This Court has held that a motion to dismiss may be upheld only if it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations. *Hishon v. King and Spalding*, 467 U.S. 69, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984). Under Florida law, on a motion to dismiss, the movant admits as true all the material facts well-pleaded. *Temples v. Florida Industrial Construction Company, Inc.*, 310 So.2d 326 (Fla. 2d DCA 1975).

As is well known to the Trustees, paragraph twenty of Marie Krieter's complaint states:

> The denial of the requested consent of use is solely for the public benefit and no harm to the public could result from authorization of the consent of use.

Each and every fact contained in Marie Krieter's Statement of the Case was lifted directly from the Complaint, including the fact that no harm, environmental or otherwise, to the public could result from the authorization. Such fact

is germane to whether the denial of authorization to construct the wharf was a valid exercise of the police power, or was the confiscation of private property for a public park.

The attempt by the Trustees to canonize a rule of the Division of Recreation and Parks must be deflected. The park rule referenced by the Trustees without citation is found at 16D-2.011, Florida Administrative Code Annotated, and the annotation to the rule shows that it was in place by October 20, 1972. It was not until the Trustees changed their policy simply by vote on April 12, 1990, that wharves could no longer be constructed offshore riparian lands into the waters of the park. The rule in no way can be considered a statute or a public law.

The Trustees cite extensively to Florida cases in an aberrant attempt to show that Florida property law relating to riparian rights is different from that of the other states that have addressed the issue. Nothing could be further from the truth. The Florida cases cited by the Trustees all confirm the existence of the riparian right to wharf out. In addition to the cases cited by the Trustees, recent Florida case law points out that riparian rights are property.

In 1982, the Fourth District Court of Appeal certified to the Supreme Court of Florida the question:

> [d]oes Florida law permit riparian (or littoral) rights to be separated from riparian lands?

Belvedere Development Corporation v. Department of Transportation, 413 So.2d 847 (Fla. 4th DCA 1982). The Florida Supreme Court responded by stating:

> [f]or this reason we will not hold that riparian

> rights are never severable from the riparian lands; however, we must conclude that the act of condemning petitioner's land without compensating them for their riparian property rights under these facts was an unconstitutional taking.

Belvedere Development Corporation v. Department of Transportation, 476 So.2d 649 (Fla. 1985).

The Florida Supreme Court then went on to discuss what those riparian rights were, and the Court quoted with approval from the concurring opinion by Judge Hersey that:

> [Riparian] rights basically include (1) general use of the water adjacent to the property; (2) to wharf out to navigability; (3) to have access to navigable waters; and (4) the right to accretions.

Id. at 651.

In the case at bar, the Third District Court of Appeal's reliance on the fact that the submerged lands offshore Krieter's property are owned by the State to defeat her claim of riparian rights is contrary to prior decisions by Florida courts. In the case of *Hayes v. Bowman*, 91 So.2d 795 (Fla. 1957), the Florida Supreme Court points out that riparian rights are appurtenances to ownership of the uplands and are not founded on ownership of the submerged lands. *Id.* at 802.

Marie Krieter reaffirms her statements that since the time of statehood, the Florida Supreme Court has acknowledged the riparian owner's right to wharf out, and that the Courts of the State of Florida have only recently equated the ownership of submerged lands with riparian rights. It it more likely than not that the Florida Supreme

Court's refusal to review the lower court opinion stems from a reluctance to encourage suits for an unconstitutional taking of property by a land use regulation. In a somewhat similar context, the Eleventh Circuit stated:

> Furthermore, in view of the Florida Supreme Court's concern to avoid a "chilling effect" on local government land use planning, it is likely that Florida courts would view with particular disfavor a claim for money damages stemming from good faith, albeit confiscatory, zoning activities on whatever theory.

Corn v. City of Lauderdale Lakes, 816 F.2d 1514, 1519 (11th Cir. 1987).

CONCLUSION

Contrary to the statements of the Trustees, Marie Krieter has never asserted that she had an unfettered right to wharf out. She has always conceded that her right is subject to the police power; however, she will never concede that her right is subject to a park power.

Respectfully submitted,

ROBERT A. ROUTA
Post Office Drawer 6506
Tallahassee, FL 32314
904/926-6300

Attorney for Petitioner
Marie M. Krieter,
Trustee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three (3) copies of the foregoing Reply to Brief in Opposition have been served this 29th day of September, 1992 by U.S. Mail upon John Costigan, Esq., Department of Natural Resources, 3900 Commonwealth Blvd., Tallahassee, Florida 32399.

Robert A. Routa